

Galesburg Construction Company, Inc. and John E. Knowles. Case 14-CA-15145

26 August 1983

SUPPLEMENTAL DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
JENKINS AND ZIMMERMAN**

On 10 March 1983 Administrative Law Judge Benjamin Schlesinger issued the attached Supplemental Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Galesburg Construction Company, Inc., Quincy, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

SUPPLEMENTAL DECISION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge: On December 15, 1981, the National Labor Relations Board granted summary judgment finding that Respondent Galesburg Construction Company, Inc., violated Section 8(a)(3) and (1) of the Act by, *inter alia*, refusing to hire employee John E. Knowles because of his union and concerted and protected activities (259 NLRB 722). The Board ordered that Respondent offer Knowles immediate and full employment in the position for which he applied and make him whole for any loss of earnings he may have suffered by reason of the discrimination.¹ The Board's Order was enforced in full by the United States Court of Appeals for the Seventh Circuit on June 9, 1982.

Because Respondent allegedly failed to comply with the provisions of the Board's Order, the Regional Director issued on October 28, 1982, a backpay specification

and notice of hearing, claiming that² Respondent failed to pay to Knowles the sum of \$14,204.20 as net backpay, payments due for the pension fund, and insurance premiums. A hearing was held before me in St. Louis, Missouri on February 9, 1983.

Knowles was employed as a laborer at the time the discrimination occurred. He was told on June 19, 1981, the day after his sole day of employment, that he would not be hired on Respondent's projects in Quincy, Illinois, because of his union activities and, since June 18, Respondent has refused to hire him. Respondent admitted the accuracy of the Regional Director's computations and formula for determining the backpay alleged to be due and the backpay period involved. The sole issue presented herein is whether Respondent had work available for laborers, specifically Knowles, for the entire backpay period. I find that it did.

Respondent conducted three different construction jobs in Quincy, Illinois, from June 18, 1981, through July 1982: at J. C. Penney, Blessing Hospital, and Pay Less.³ Respondent's amended answer admitted that Knowles would have been employed only sporadically through October 1981, although its brief suggests that Knowles probably would have been employed into December 1981. The only doubt raised by Respondent that Knowles would not have been so employed was based on the theory that Knowles' work performance was inadequate and he would not have been selected to work for Respondent, a defense which I dismissed at the hearing based on *Flora & Argus Construction Co.*, 149 NLRB 583 (1964), *enfd.* 354 F.2d 107 (10th Cir. 1965).

There is more than ample proof in this record that, at least through December 22, 1981, there were laborers employed by Respondent, of whom Knowles should have been one. From that time on, Respondent regularly employed three employees, Harry Hill, allegedly at its Blessing Hospital site, Larry Johnson, allegedly at its J. C. Penney site, and Allan Reynolds, allegedly at its Pay Less site. Another laborer, Brian Toomey, was employed in February, March, and April at the Blessing and J. C. Penney sites. Although all are admitted by Respondent to be laborers, Respondent claims that its practice on layoff required it to lay off its laborer foremen last and that both Johnson and Reynolds were laborer foremen. Laborer foremen are covered employees under Respondent's collective-bargaining agreement. The agreement is silent about any order of layoff, except that a union steward is protected as the last employee to be laid off. None of the laborers employed by Respondent in 1982 was shown to be union stewards. Indeed, inasmuch as the agreement required that laborer foremen shall be placed on all jobs when five laborers are employed, there was no need to have a laborer foreman on any of its jobs, especially when, according to Respondent's proof,

² The backpay specification was further amended at the hearing.

³ The Board's original Decision states that J. C. Penney and Blessing Hospital were the only jobsites involved herein. However, that finding was obviously based on the complaint in the unfair labor practice proceeding, because Respondent's answer was stricken and no hearing was held. I find no cogent reason why I should not consider the Pay Less site as another site on which Knowles could have been employed, had he been reinstated.

¹ On December 21, 1981, Respondent filed a motion to dismiss and on January 8, 1982, an amended motion to dismiss the Board's Decision and Order. The Board denied the motions on February 4, 1982.

there were no other employees with whom Hill and Johnson worked.

There is even greater question here because at no time has Respondent ever produced pay records to support any of its claims as to who worked and where. Pay records would have reflected whether Hill and Johnson were paid as laborer foremen⁴ and on which jobsite they, Reynolds, and Toomey were employed. I infer from Respondent's failure to produce documents in its control and which were vital to prove its defense that the records did not support Respondent's position. Furthermore, finding that there is no validity to Respondent's position that laborer foremen were entitled to superseniority and to be laid off last and that there is no reason for Respondent's failure to employ Knowles, I conclude that there is no way that Respondent can meet its burden of proving that, even had it reemployed Knowles, it would have also laid him off. *NLRB v. Brown & Root*, 311 F.2d 447 (8th Cir. 1963). Rather, Knowles may have proven himself to be a superior workman, able to do all that Respondent's remaining employees did, and better. With the uncertainties present herein, "the backpay claimant should receive the benefit of any doubt rather than the Respondent, the wrongdoer responsible for the existence of any uncertainty and against whom any uncertainty must be resolved." *United Aircraft Corp.*, 204 NLRB 1068 (1973); *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 572-573 (5th Cir. 1966).⁵

⁴ Laborer foremen were entitled to receive \$.75 per hour more than the highest paid laborer under his supervision.

⁵ The principal decisions relied on by Respondent are inapposite. *NLRB v. Iron Workers Local 378*, 532 F.2d 1241 (9th Cir. 1976), involved the propriety of the Board's formula to determine backpay based on a representative complement of employees. Here, Respondent conceded the propriety of the Board's formula. In *NLRB v. United Contractors*, 619

Accordingly, based on the entire record herein and Respondent's various admissions of pertinent allegations contained in the backpay specifications, and on my consideration of the briefs filed by the General Counsel and Respondent, I hereby make the following recommended:

SUPPLEMENTAL ORDER⁶

The Respondent, Galesburg Construction Company, Inc., Quincy, Illinois, its officers, agents, successors, and assigns, shall pay as backpay to John E. Knowles the sum of \$13,144.80, with interest as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977),⁷ less tax withholdings required by Federal, state, and local laws, and shall pay on behalf of Knowles to the pension fund the sum of \$634.32 and as insurance premiums the sum of \$425.08, plus lawful interest accrued to the date of payment, due in accordance with the collective-bargaining agreement, effective May 1, 1980, between Central Illinois Builders of A.G.C. and Central Illinois Laborers' District Council, under which Respondent is bound.

F.2d 134 (7th Cir. 1980), the respondent there proved that during slack periods work was assigned to available employees according to seniority. Here, there are merely contentions that laborer foremen were normally the last to be laid off, with no contractual requirement that that be so; that whether laborer foremen would be retained depended on whether they were good employees; that certain employees were laborer foremen, whereas I find that under the agreement they could not be and there is no documentary proof that they were; and that Knowles, absent any discrimination, would not have been retained as an employee, which I find has not been proved.

⁶ In the event no exceptions are filed as provided in Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Supplemental Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Supplemental Order, and all objections thereto shall be deemed waived for all purposes.

⁷ See, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962).